DAVID KUOK KHOON HIN

v.

ROSE KUOK KOK HIANG

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-635-1996]
10 SEPTEMBER 2002

CIVIL PROCEDURE: *Judgments and orders - Validity of order - General principles - Whether withdrawal of an originating process renders void all orders previously made under it - Withdrawal of divorce petition by wife - Whether interim maintenance order previously made ceases to have effect - Judge staying husband's cross-petition on ground of non-compliance with interim maintenance order - Whether order of stay bad*

FAMILY LAW: *Divorce - Petition for divorce - Withdrawal of petition - Effect of withdrawal - Interim maintenance order previously made - Whether still in existence and valid - Whether all orders made pursuant to petition cease to have effect - Judge staying husband's cross-petition on ground of non-compliance with interim maintenance order - Whether order of stay bad*

The petitioner ('the wife') presented a petition for divorce before the High Court in 1985. Thereafter, the respondent ('the husband') responded with a cross-petition on the ground of adultery. In March 1986, the High Court granted the wife an interim order for maintenance. In November 1993, however, the wife withdrew her petition. Thereafter, the husband ceased to make the maintenance payments under the interim order. In August 1995, the wife moved the High Court for an order staying the husband's cross-petition on the ground of non-compliance with the interim order. The learned judge then stayed the cross-petition pending the settlement of the arreas of the maintenance payments. Aggrieved, the husband appealed to the Court of Appeal. The sole issue that arose for decision before the lord justices of appeal was whether the withdrawal of the petition by the wife in November 1993 had any effect on the interim order for maintenance.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the oral judgment of the court:

[1a] Neither the Law Reform (Marriage & Divorce) Act 1976 ('the Act') nor the Divorce & Matrimonial Proceedings Rules 1980 ('the Rules') contains any provision concerning the effect that the withdrawal of a petition has upon the orders that have been previously made under the petition. Section 47 of the Act which deals with the 'substantive' principles of law to be applied in matrimonial proceedings also has no application in the present case. (p 77 a-e)

[1b] In the clear absence of any provision in the Act or the Rules that is applicable, the general principles of civil procedure must and do apply. (p 77 f)

[1c] When an originating process is withdrawn, all the orders that have been made under it fall with it. Such orders cease to have any future effect. If a party wishes to have further relief after the withdrawal, the general rule is that he has to apply afresh, either in new proceedings brought for that purpose or in any remnants of the old proceedings. (p 77 f)

[1d] In the present case, the wife lost her rights under the interim maintenance order when she withdrew her divorce petition. She would not, therefore, be entitled to seek a variation of a non-existent order. (p 78 a)

[1e] Hence, the order of the learned judge staying the husband's cross-pettiton was bad as it was based on an alleged non-compliance with a non-existent order. (p 78 b)

[Order of stay set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pada tahun 1985 pempetisyen ('isteri') telah memfail petisyen perceraian di Mahkamah Tinggi. Berikutnya, responden ('suami') memfail petisyen balas atas alasan perzinaan. Pada Mac 1986, Mahkamah Tinggi membenarkan perintah nafkah interim kepada isteri. Bagaimanapun, pada November 1993, isteri telah menarik balik petisyennya. Berikutan itu, suami berhenti dari membuat bayaran nafkah di bawah perintah interim. Pada Ogos 1995, isteri memohon perintah kepada Mahkamah Tinggi untuk menggantung petisyen balas suami atas alasan ia tidak mematuhi perintah interim. Yang arif hakim kemudian menggantung petisyen balas sementara menunggu pembayaran tunggakan nafkah. Terkilan, suami merayu ke Mahkamah Rayuan. Di hadapan yang arif hakim-hakim rayuan, isu tunggal yang berbangkit adalah sama ada penarikan balik petisyen oleh isteri pada November 1993 di atas mempunyai kesan terhadap perintah nafkah interim.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman lisan mahkamah:

[1a] Akta Pembaharuan Perkahwinan (Perkahwinan & Perceraian) 1976 ('Akta') serta Kaedah-Kaedah Prosiding Perkahwinan 1980 ('Kaedah') tidak mengandungi apa-apa peruntukan mengenai kesan yang mungkin terbit dari suatu penarikan balik petisyen ke atas perintah-perintah terdahulu yang dibuat di bawah petisyen. Seksyen 47 Akta yang menyentuh prinsip undang-undang substantif yang perlu digunapakai dalam prosiding perkahwinan juga tidak terpakai kepada kes semasa.

[1b] Dengan ketiadaan ketara peruntukan-peruntukan yang boleh digunapakai di dalam Akta mahupun Kaedah, prinsip am prosedur sivil hendaklah dan harus digunapakai.

[1c] Apabila sesuatu proses asal telah ditarik balik, kesemua perintah yang dibuat di bawahnya akan gugur bersama-samanya. Perintah-perintah sedemikian tidak mempunyai sebarang kesan terkemudian. Dan sekiranya suatu pihak ingin mendapatkan relif-relif lain selepas penarikan balik, kaedah amnya adalah bahawa ia harus memohon semula, sama ada dalam prosiding baru yang dibuat dengan tujuan itu ataupun dalam mana-mana lebihan prosiding asal.

[1d] Dalam kes semasa, isteri telah kehilangan hak di bawah perintah interim apabila beliau menarik balik petisyen perceraiannya. Beliau tidak berhak untuk memperoleh apa-apa variasi terhadap perintah yang sememangnya tidak wujud.

[1e] Dengan demikian, perintah yang arif hakim menggantung petisyen balas suami adalah satu perintah yang cacat kerana diasaskan kepada pengataan ketidakpatuhan terhadap perintah yang tidak wujud.

[Perintah penggantungan diketepikan.]

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 47

For the appellant - Nagarajah Muttiah; M/s Shook Lin & Bok
For the respondent/petitioner - Sanjeev Kumar Rasiah (V Dhanaraj); M/s Sanjeev Kumar

[Appeal from High Court, Kuala Lumpur; Divorce Petition No: 500-1995]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

This appeal arises out of the order of the High Court dated 28 November 1995 which is in the following terms:

(i) that the cross petition by the respondent (husband) be and is hereby stayed pending the settlement of arrears of maintenance pending suit in accordance with the order dated 11 March 1986;

(ii) that the respondent do reimburse and pay to the petitioner (wife) for expenses reasonably incurred by the petitioner in attending the hearing on 13 June 1995 and future expenses to be incurred;

(iii) that the order for maintenance pending suit dated 11 March 1986 be varied by increasing the amount payable thereunder and the provision for return air ticket to United Kingdom be deleted;

(iv) that the petitioner be allowed to make such amendments to her reply to answer and cross-petition dated 30 June 1986 to include the necessary claims for ancillary reliefs; and

(v) that the respondent do pay the petitioner the costs of the application.

The factual background against which this appeal rests is as follows.

In 1985 the respondent before us, the wife, ("petitioner in the court below") presented a petition for divorce. The appellant, the husband, ("respondent and cross petitioner in the court below") delivered his pleadings. His cross petition also claimed a decree for divorce on grounds of adultery. A co-respondent was cited in his answer and cross petition. On 11 March 1986 the High Court granted an interim order for maintenance in the sum of RM2,500 per month in favour of the wife. Later, on 4 November 1993 the wife withdrew her petition. Thereafter, the husband ceased to pay maintenance in accordance with the aforesaid interim order.

On 25 August 1995, some two years after the husband ceased payment of the maintenance, the wife moved the High Court once again. She asked for an order staying the husband's cross-petition on the grounds that he had failed to comply with the earlier order for interim maintenance. The learned judge who heard the application made those orders to which we adverted in the opening paragraphs of this judgment. The husband has appealed to us.

Several arguments have been advanced this morning. We find it unnecessary to deal with all of them. There is really only one significant issue in this appeal. It is whether the wife's withdrawal of her petition had any effect upon the interim order of maintenance made on 11 March 1986. Counsel on both sides who argued this appeal with some thoroughness have taken us through the relevant provisions of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") and the Divorce and Matrimonial Proceedings Rules 1980 ("the Rules"). We find nothing in either written law, that is to say the Act or the Rules, that deals with or meets the particular and peculiar issues that have arisen for decision in this appeal. Nowhere in either the Act or the Rules is there any provision that deals with the effect upon an order made on a petition when that petition is withdrawn.

Counsel for the respondent wife made a faint attempt to rely on English Law. He cited s. 47 of the Act which reads as follows:

> Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

In our view this provision gives no assistance to the respondent. What that section means is that in determining substantive issues in matrimonial proceedings, the High Court is entitled to draw from English principles where there are no specific principles established by our common law. In our view, the section has no application to the appeal before us.

In our judgment, in the patent absence of any provision in the Act and the Rules upon the issue already formulated, general principles of civil procedure must apply. One such general principle which is relevant to the present appeal, is that when an originating process is withdrawn, all orders made thereunder fall with it. They cease to have any future effect. If a party wants to have further relief after such withdrawal, then the general rule of civil procedure is that he or she has to apply afresh, either in new proceedings brought for that purpose, or in any remnants of the old proceedings.

Take the case of an action by writ. When a defence and counterclaim is delivered, the discontinuance of the writ has no effect on the counterclaim and the defendant is entitled in the proceeding to seek relief. If the plaintiff has filed a defence to the counterclaim, and a counterclaim to the counterclaim, then he is of course equally entitled to seek such interim relief that he proposes to have.

Applying these general rules of civil procedure to the present proceedings, in our view, when the wife withdrew the petition she lost her rights under the interim maintenance order of 11 March 1986. She was therefore not entitled to seek a variation of a non-existent order. Other appropriate steps were available to her, but she did not pursue these.

In our judgment the order made by the learned judge cannot stand. It must be set aside. Since the basis of the learned judge's decision to stay the cross-petition was based on the alleged non-compliance of a non-existent order, that order cannot also stand. For the reasons already given, the appeal succeeds.

I will now invite Abdul Kadir bin Sulaiman JCA to deliver the formal order of this court.

Abdul Kadir Sulaiman JCA:

The appeal by the appellant is allowed. The order by the learned judge is set aside. No order as to costs here and below. The deposit is to be refunded to the appellant.